

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1429

To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1429

UNITED STATES OF AMERICA,
Appellant,

—v.—

ELISEO SANCHEZ RUEDA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

AUDREY STRAUSS,
*Assistant United States Attorney,
Of Counsel.*

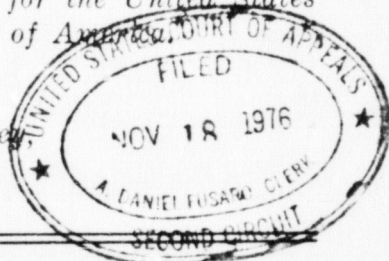


TABLE OF CONTENTS

| | PAGE |
|---|------|
| Preliminary Statement | 1 |
| Statement of Facts | 4 |
| A. The Evidence Adduced at the Suppression Hearing | 4 |
| 1. Ana Lupe Rodriguez is apprehended with drugs | 4 |
| 2. Rodriguez agrees to cooperate | 4 |
| 3. Sanchez-Rueda is arrested with Rodri- guez' assistance | 5 |
| 4. Sanchez-Rueda is searched | 6 |
| 5. The agents proceed to arrest Camargo | 7 |
| 6. Defense testimony | 9 |
| B. The District Court's Findings and Opinion | 11 |
| ARGUMENT: | |
| There Was Probable Cause for the Arrest of Sanchez-Rueda and Accordingly the Matchbook Seized Incident to His Arrest Should Not Have Been Suppressed | 13 |
| A. The Requirement of Known Reliability ... | 13 |
| B. The Requirement of Corroboration | 16 |
| C. The Existence of Probable Cause and the Lawfulness of the Seizure | 18 |
| CONCLUSION | 21 |

TABLE OF CASES

| | PAGE |
|---|--------|
| <i>Agnellino v. New Jersey</i> , 493 F.2d 714 (3rd Cir. 1974) | 15 |
| <i>Aguilar v. Texas</i> , 378 U.S. 108 (1964) | 13, 14 |
| <i>Armour v. Salisbury</i> , 492 F.2d 1032 (6th Cir. 1974) | 15 |
| <i>Beck v. Ohio</i> , 379 U.S. 89 (1964) | 18 |
| <i>Cundiff v. United States</i> , 501 F.2d 188 (8th Cir. 1974) | 15 |
| <i>Louie v. United States</i> , 426 F.2d 1398 (9th Cir.), cert. denied, 400 U.S. 918 (1970) | 15 |
| <i>McCreary v. Sigler</i> , 406 F.2d 1264 (8th Cir.), cert. denied, 395 U.S. 984 (1969) | 15 |
| <i>Spinelli v. United States</i> , 393 U.S. 410 (1969) ... | 13, 14 |
| <i>United States v. Barfield</i> , 507 F.2d 53 (5th Cir.), cert. denied, 421 U.S. 950 (1975) | 15 |
| <i>United States v. Bell</i> , 457 F.2d 1231 (5th Cir. 1972) | 15 |
| <i>United States v. Burke</i> , 517 F.2d 377 (2d Cir. 1975) | 14 |
| <i>United States v. Darenbourg</i> , 520 F.2d 985 (5th Cir. 1975) | 14, 15 |
| <i>United States v. Edmonds</i> , 535 F.2d 714 (2d Cir. 1976) | 18, 20 |
| <i>United States v. Edwards</i> , 415 U.S. 800 (1974) ... | 20 |
| <i>United States v. Dzialak</i> , 441 F.2d 212 (2d Cir.), cert. denied, 404 U.S. 883 (1971) | 16 |
| <i>United States v. Harris</i> , 403 U.S. 573 (1971) | 13 |
| <i>United States v. Karanthanos</i> , 531 F.2d 26 (2d Cir.), cert. denied, 44 U.S.L.W. 3762 (July 6, 1976) | 14, 19 |

| | PAGE |
|--|------------|
| <i>United States v. Klein</i> , 522 F.2d 296 (1st Cir. 1975) | 19 |
| <i>United States v. Mahler</i> , 442 F.2d 1172 (9th Cir.), cert. denied, 404 U.S. 993 (1971) | 15 |
| <i>United States v. McCoy</i> , 478 F.2d 176 (10th Cir.), cert. denied, 414 U.S. 828 (1973) | 15 |
| <i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975) | 14, 15, 19 |
| <i>United States v. Polus</i> , 516 F.2d 1290 (1st Cir.), cert. denied, 423 U.S. 895 (1975) | 19 |
| <i>United States v. Rajewich</i> , 470 F.2d 666 (8th Cir. 1972) | 15 |
| <i>United States v. Robinson</i> , 414 U.S. 218 (1973) | 20 |
| <i>United States v. Rodriguez</i> , 532 F.2d 834 (2d Cir. 1976) | 14 |
| <i>United States v. Rollins</i> , 522 F.2d 160 (2d Cir.), cert. denied, 424 U.S. 918 (1976) | 14, 16 |
| <i>United States v. Sultan</i> , 463 F.2d 1066 (2d Cir. 1972) | 14, 16 |
| <i>United States v. Unger</i> , 469 F.2d 1283* (7th Cir. 1972), cert. denied, 411 U.S. 920 (1973) | 15 |
| <i>United States v. Viggiano</i> , 433 F.2d 716 (2d Cir. 1970) | 16 |
| <i>United States ex rel. Saiken v. Bensinger</i> , 489 F.2d 865 (7th Cir. 1973), cert. denied, 417 U.S. 910 (1974) | 15 |
| <i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) | 20 |

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States appeals from an order filed on August 31, 1976 in the United States District Court for the Southern District of New York, by the Honorable Kevin T. Duffy, United States District Judge, granting the motion of defendant Eliseo Sanchez-Rueda to suppress evidence.

Indictment 76 Cr. 625, filed on July 6, 1976, charged Eliseo Sanchez Rueda, a/k/a "Eugardo Orozco," and Jesus Pena P., a/k/a "Alphonzo Camargo," a/k/a "El Viejito," in one count with conspiracy to import a narcotic controlled substance in violation of Title 21, United States Code, Sections 846 and 963.*

* After the filing of the indictment the defendant named therein as "Jesus Pena P." was referred to predominantly through the proceedings as "Alphonzo Camargo" and this brief, accordingly, refers to him as Camargo.

On June 26, 1976, at the arraignment upon the complaint, bail was set at \$50,000 cash or surety bond by Magistrate Sol Schreiber, and on July 5, 1976 at the arraignment upon the indictment, Judge Robert J. Ward denied motions to reduce bail on the ground that both defendants were Colombian citizens with no roots in the community.* The defendant Sanchez-Rueda made further bail applications before Judge Duffy on July 14 and 15, 1976, and on the latter date, bail was reduced to \$35,000. Thereafter, on July 30, 1976, the court directed the Government to return to Sanchez-Rueda approximately \$10,000 which had been seized at the time of his arrest. On August 3, 1976, after the Internal Revenue Service placed a levy on that \$10,000, Judge Duffy released Sanchez-Rueda on his own recognizance. On August 19, 1976, defense counsel conceded that Sanchez-Rueda had become a fugitive and that he became a fugitive in full awareness of the pending trial date. The Government indicated that it would try Sanchez-Rueda in absentia.

On the same date, a suppression hearing commenced. At the conclusion of the hearing, on August 26, 1976 Judge Duffy granted the defendants' motions to suppress in their entirety, finding that there was no probable cause for the arrest of either defendant and that a written consent to search defendant Alphonzo Camargo's hotel room, signed by Camargo, was involuntary. Pursuant to these rulings, the motions to suppress were granted.

Immediately before ruling on the motions to suppress, Judge Duffy reduced Camargo's bail from the previously

* Judge Ward pointed out, rather picturesquely, that the defendants' "only roots . . . are their shoes standing on the floor in this court room." (Tr. 6/7/76, at 14).

"Tr." refers to the hearing transcript, except if designated by a particular date; "App." refers to the Government's appendix.

set \$50,000 cash or surety bond to a \$500 personal recognizance bond.*

Pursuant to the provisions of 18 U.S.C. § 3731, the Government appeals from the District Court's determination that there was no probable cause to arrest the defendant Sanchez-Rueda and it seeks reversal of the

* The motion to reduce bail was made by Camargo's attorney only after the District Court had repeatedly, though indirectly, called for the motion. At the hearing on August 25, 1976 the court directed the defense attorneys' attention to a notation on Camargo's passport indicating that Camargo was to have left the United States by August 26, 1976. (Tr. 289). Shortly thereafter, the court asked Mr. Zapp, Camargo's attorney, if he had an application. (Tr. 291). Mr. Zapp moved to withdraw his client's testimony and to suppress the evidence, to which the court responded, "The two of you haven't figured it out yet? Take three minutes. Search your head. There is one more application which I am expecting." (Tr. 292). Mr. Zapp then moved to dismiss the indictment and the court immediately denied the motion. (Tr. 293). Later that day, the court addressed defense counsel asking, "did either one of you figure out what the other motion was?" Mr. Zapp then moved for the return of moneys seized from his client. (Tr. 297). The court reserved decision on that motion. (Tr. 298). On the next day, at the close of the morning session, Judge Duffy announced that the "motion for reduction of bail that was made yesterday will be considered at two o'clock." (Tr. 349). (The record of the prior day's proceedings does not reflect that such a motion had been made, despite Judge Duffy's apparent efforts to invite one.) At two o'clock, the court said, "Mr. Zapp, your first motion?" Mr. Zapp replied, "To suppress all of the property seized—Your Honor, I am sorry. My first motion would be for a reduction of bail." Without hearing any argument on the motion from either side, Judge Duffy immediately reduced bail for Camargo from \$50,000 cash or surety bond to a \$500 personal recognizance bond. (Tr. 350). After granting the motion, Judge Duffy reluctantly allowed the Government to voice its opposition. (Tr. 350-51). The court adhered to its decision, and Camargo was released that day after signing the bond.

order suppressing the evidence seized from that defendant's person incident to his arrest.*

Statement of Facts

A. The Evidence Adduced at the Suppression Hearing

1. Ana Lupe Rodriguez is apprehended with drugs.

At the suppression hearing, the Government established that in June, 1976 United States Customs officers detained a Colombian woman who attempted to enter Puerto Rico with three kilograms of cocaine concealed in a suitcase with a false bottom. (Tr. 26). The woman was travelling under a passport issued to "Cynthia Maria McGlinn," however, she later admitted that her true name was Ana Lupe Rodriguez. Andres Amador, a special agent of the Drug Enforcement Agency ("DEA") took her into custody and persuaded her to cooperate with the Government in an effort to round up her accomplices. (Tr. 27).

2. Rodriguez agrees to cooperate.

Rodriguez agreed to cooperate and proceeded to describe to Agent Amador the plan in which she was

* The Government has not appealed the District Court's finding that the search of Camargo's hotel room was pursuant to an involuntary consent and that, therefore, the evidence seized from his room must be suppressed. Although we continue to disagree with the District Court's findings, we recognize that it turns on questions of credibility which this Court will not review. In order to provide the Court with a full understanding of the suppression hearing below, however, we have set forth the hearing testimony concerning Camargo's arrest and the later search of his hotel room.

involved. She told him that the suitcase and the false passport had been given to her by her lover, Eliseo Sanchez [Rueda].* (Tr. 26, 28, 91). She said that she had travelled a circuitous route from Colombia to Curacao and from Curacao to Puerto Rico. (Tr. 27). She was supposed to fly from Puerto Rico to Philadelphia, and from there she was to travel to New York where she would deliver the suitcase to Sanchez-Rueda at the McAlpin Hotel. (Tr. 27-28, 101).

The procedures for her trip, she told the Agent, had been previously tested in a February 1976 dry run when she made this same trip using the false passport and did not encounter any problems. (Tr. 28). At that time she was accompanied by Sanchez-Rueda's "right-hand man," a person whom she described as an old man and whom she knew as "El Viejito," the little old man. (Tr. 28-29). During this earlier trip, she and "the old man" had stayed at the Penn Terminal Hotel, where he registered under the name "Jesus Pena." They went to El Paso, Texas for a few days to meet someone from Colombia who never showed up. Subsequently, they returned to New York and then to Colombia. (Tr. 30).

Rodriguez furnished Agent Amador with descriptions of both Sanchez-Rueda and "the old man." (Tr. 31). Rodriguez and Agent Amador proceeded to New York for the purpose of apprehending the co-conspirators. (Tr. 31).

3. Sanchez-Rueda is arrested with Rodriguez' assistance.

On June 25, 1976, DEA agents set up surveillance at the McAlpin Hotel where Rodriguez was scheduled to

* The defendant Eliseo Sanchez Rueda was frequently described during the proceedings by use of his father's last name "Sanchez," without reference to his mother's maiden name, "Rueda," as is consistent with Spanish custom.

meet Sanchez-Rueda. (Tr. 33). Rodriguez was equipped with two recording devices, a Kel transmitter and a Nagra body tape recorder; adjacent hotel rooms were rented for her and the agents. (Tr. 33-34). Before meeting Sanchez-Rueda, Rodriguez called her mother in Colombia and her mother told her that Sanchez-Rueda had been calling and asking for her. (Tr. 33).

Rodriguez proceeded to the lobby of the hotel where the agents observed her meeting a man who fit the description which she had given of Sanchez-Rueda (Tr. 34). She and the man then went to a room on the twenty-first floor of the hotel. (Tr. 34). Agent Amador monitored the conversation that took place there. (Tr. 58).

Sanchez-Rueda was extremely agitated and angry that Rodriguez had been delayed. During the conversation he said that he had been "desperate" and concerned that "this girl had some problem." (GX 22-A; App. A-60). Rodriguez recited the schedule of her trip claiming that she took the route he had given her but that she got delayed by missing a plane. Sanchez-Rueda pressed her for details and remained unconvinced, saying "I think that you are lying to me." (GX 21-A, 22-A; App. A-67, A-75). Concerned for Rodriguez' welfare, the agents moved in to arrest Sanchez-Rueda. (Tr. 34, 100).

4. Sanchez-Rueda is searched.

Sanchez-Rueda was advised of his constitutional rights immediately upon his arrest. (Tr. 35, 48). He was searched twice and on the second occasion Agent Amador found and seized a matchbook. The matchbook was from the Alpine Cellar, Hotel McAlpin; on its inside cover was the following notation: "246 0700 Room 1110." (GX 2; Tr. 38).

During questioning, the defendant said that his name was "Orozco." (Tr. 49). When asked if he knew Ana

Marie Lupe [Rodriguez], the defendant said that he had just met her for the first time and was merely planning to have a good time with her. (Tr. 50, 52). Agent Amador solicited Sanchez-Rueda's cooperation, but he said that if he cooperated he would be killed. (Tr. 53, 111). When told of the seizure of the three kilograms of cocaine, Sanchez-Rueda pointed out that he had been "clean" when he was arrested. (Tr. 54, 112).*

After Sanchez-Rueda's arrest, Rodriguez confirmed that "Orozco" was in fact Sanchez-Rueda. (Tr. 55). She also said that Sanchez-Rueda had told her that "the old man" was now in New York and that he and Sanchez-Rueda had met both that night and the previous day. (Tr. 56, 57, 112-13).

5. The Agents proceed to arrest Camargo.

While other agents took Rodriguez and Sanchez-Rueda to DEA headquarters, Agent Richard K. Crawford traced the telephone number on the matchbook to the Holland Hotel and proceeded to the hotel with two other agents. (Tr. 169-70). At the Holland Hotel, they examined the registration card for Room 1110, the room number which had been written on the inside of the matchbook cover. They found that the room was registered to a Colombian named Alphonzo Camargo and that the record of Camargo's telephone, toll calls reflected several calls to Colombia. (Tr. 170, 172).

The agents proceeded to Room 1110 with an employee of the hotel. The agents knocked on the door and

* At this time, agents searched Sanchez-Rueda's room and found a wallet containing over \$10,000 in cash. (Tr. 51). The Government conceded before the suppression hearing that this search had been illegal and that this money would not be offered into evidence. (Tr. 7/29/76 at 2).

said they were the police. (Tr. 173). Camargo did not open the door. (Tr. 173). The desk clerk, James Vega, testified that at this time he received a telephone call from Camargo, who said that somebody was knocking on his door. (Tr. 148). Vega informed Camargo that the men at his door wanted to talk to him and that they had been accompanied upstairs by the desk clerk. (Tr. 149). Camargo called Vega again, at which time Vega said he would come upstairs. (Tr. 149). When Vega arrived, he told Camargo through the door that these people were federal agents. (Tr. 149, 175). One of the agents said he was a federal agent, "Immigration." (Tr. 175). Camargo opened the door and let the agents into the room. (Tr. 163, 176, 256).

The agents asked Camargo to accompany them to DEA headquarters for questioning. (Tr. 177). Although Agent Crawford testified that he did not place Camargo under arrest in the hotel room, he conceded that if Camargo had declined his invitation, the agents would not have acceded to the refusal. (Tr. 216, 226). Before leaving with Camargo, one of the agents locked the hotel room and asked the desk clerk to secure the room. (Tr. 179).

The agents then transported Camargo to DEA headquarters, arriving there around 3:30 a.m. (Tr. 179, 180). Camargo was shown photographs of Rodriguez and of Sanchez-Rueda and denied knowing either of them. (Tr. 180-81). Rodriguez was then brought in to view Camargo. She identified him. (Tr. 181). The agents then told Camargo that he was under arrest. (Tr. 181). Agent Amador advised him of his constitutional rights. (Tr. 61, 181). In the ensuing interview, Camargo said that he was a businessman involved in money exchanges and that he had \$60,000 in his hotel room. (Tr. 63). Agent Amador sought his consent to

search the room. (Tr. 64). Camargo wrote out his consent in his own handwriting; Agent Amador dictated the language. (Tr. 65; GX 1). The translation of the document read as follows:

I, Alfonso Camargo having all my faculties, authorize the federal agents to search my room in Holland Hotel. The number of my room is 1110. I give this consent freely and voluntarily without having been threatened nor having been promised anything.

(signed)

Alfonso Camargo

Before the consent was written out, Agent Amador told Camargo at least five times that he did not have to give the consent and Amador also told Camargo that anything found in his room could be used against him in a court of law. (Tr. 71). Camargo insisted that he had nothing to hide. (Tr. 70).

Agents then returned to the Holland Hotel to conduct the search of Camargo's room. (Tr. 183). The agents found and seized \$69,000 in cash in three suitcases. They also seized a bill from the Hotel McAlpin in Camargo's name, a paper with computations on it, and an address book. (Tr. 186-87; GX 3, 4, 8).

6. Defense Testimony.

After the presentation of the Government's evidence, the defendant Camargo testified in his own behalf and called Joseph M. Falotico, a security officer at the Holland Hotel.

Falotico testified that while on duty at the hotel on the night of Camargo's arrest, he had observed the agents and the assistant manager, Elizabeth Wallace, on the eleventh floor "standing at a door trying to get in." (Tr.

227). The night clerk, Jimmy Vega, arrived, knocked on the door and said something in Spanish. (Tr. 228). The door was opened; three people then entered the room. (Tr. 228-29). During the next twenty minutes he heard muffled whispers and coughing. (Tr. 229). The officers later left with an old man and one officer asked him to lock the room. (Tr. 230-31).

Camargo testified that at 3:30 a.m. on June 26, 1976 some men banged on his hotel room door, as a result of which he called the reception desk twice. (Tr. 254-55). The desk clerk came up and said that the men were from Immigration. (Tr. 255). He opened the door, first leaving the chain and then with the chain removed. (Tr. 256). The men entered in a group. (Tr. 256). They looked under the bed, in the bathroom and "in little corners." (Tr. 256). They then ordered him to get dressed and said that he was under arrest. (Tr. 256).

After being transported to DEA headquarters, they asked if he knew Lupe or Orozco. (Tr. 259). He told them that he had \$70,000. (Tr. 262). Agent Amador told him that he had to give permission to take the suitcases or else he would not have the suitcases returned to him. (Tr. 262). The agents never explained that anything found would be used against him or that he could consult with an attorney. (Tr. 265).

On cross-examination Camargo stated that he was a businessman who dealt in real estate and currency exchange and was familiar with the legal aspects of his business. (Tr. 267-69). He explained his possession of the \$69,000 in cash by stating that he had come to New York to deposit it in a bank, much like people who have taken money to Switzerland. (Tr. 270). He admitted that although he had arrived in New York on June 9, 1976 with the money, as of June 26, 1976 he had not yet de-

posited it. (Tr. 272). He also admitted that, when he gave the consent to search, he wanted to show the agents that he had nothing to hide. (Tr. 346).

The defendant Sanchez-Rueda had fled by the commencement of the hearing. No witnesses were presented in his behalf.

B. The District Court's Findings and Opinion

After the completion of the suppression hearing, Judge Duffy read his findings and opinion into the record. (Tr. 358-67). The court found that Rodriguez had been arrested on June 24, 1976 in Puerto Rico while in possession of luggage containing three kilograms of cocaine; that she agreed to cooperate with DEA agents; and that she told the agents that the suitcase had been given to her by the defendant Sanchez-Rueda. (Tr. 359). The court also found that she told the agent that she had travelled through intermediate stops from Colombia to Puerto Rico; that Sanchez-Rueda had given her a bogus passport; and that she had travelled with "El Viejito," the little old man. (Tr. 359). As to the circumstances of Sanchez-Rueda's arrest, Judge Duffy found that Rodriguez had given Agent Amador a description of Sanchez-Rueda and that the agents observed Rodriguez meet a man fitting that description in the McAlpin Hotel on June 25, 1976. (Tr. 359-60).

After describing the arrest of Sanchez-Rueda, Judge Duffy rendered the following opinion with respect to it:

"The arresting agent testified at the hearing that the sole factual basis for determining the probable cause to arrest Sanchez Rueda were statements by Ana Lupe Rodriguez. These statements by an individual whose reliability is totally

unknown to the agents, who was caught with incriminating evidence, and whose statements tend to inculcate another individual, can hardly be a sufficient basis for probable cause. (See *Wong Sun v. United States*, 371 U.S. 471 (1963) where the Supreme Court found an arrest to be illegal on facts similar to these.) Uncorroborated information from a person of unknown reliability is simply not a basis for probable cause.

Certainly the Kel transmissions can offer no corroboration. First, it is clear that the government agents admitted that they did not monitor all of the transmission. Second, there is nothing on the tape of that transmission, which indicates that Rueda had any knowledge of the woman's involvement with illicit drugs.

On all the evidence and particularly on the credibility of the various witnesses, I find that the arrest of Sanchez Rueda was made without probable cause." (Tr. 360-61).

Having found the arrest of Sanchez-Rueda to have been illegal, the court went on to find that the matchbook seized from him was a fruit of the illegality and would be suppressed. (Tr. 362).

With respect to Camargo, the court determined that his arrest occurred in his hotel room because his liberty was effectively restricted there. (Tr. 364). The court then concluded that there was no probable cause for that arrest. Although the District Court stated that the illegality of Camargo's arrest invalidated the written consent to search his room, it went on to find that in any event the consent was involuntary. (Tr. 365).

ARGUMENT

There Was Probable Cause for the Arrest of Sanchez-Rueda and Accordingly the Matchbook Seized Incident to His Arrest Should Not Have Been Suppressed.

In concluding that there was no probable cause for the arrest of Sanchez-Rueda, the District Court relied on two determinations: first, that the agents could not properly rely on the information supplied by Rodriguez because her reliability was unknown; and, second, that there was no corroboration of Rodriguez' story because there was no further evidence that Sanchez-Rueda was involved in a drug transaction. Each of these determinations stands in conflict with applicable law, which clearly supports a finding of probable cause on the facts of this case.

A. The Requirement of Known Reliability

Although the District Court did not specifically mention the cases from which it concluded that there was a requirement of known reliability for Rodriguez, that rule is usually associated with *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). Those cases discussed the need for some showing that an informant was reliable before there could be a finding of probable cause based on information which the informant supplied. Apart from the fact that the viability of *Aguilar* and *Spinelli* has been questioned even as they apply to information furnished by unidentified informants, *United States v. Harris*, 403 U.S. 573 (1971), the District Judge entirely ignored those decisions, rendered since *Aguilar* and *Spinelli*, in this Circuit and others, which recognize that there is no need to show past reliability in the case of a victim of, eyewitness to, or participant in, the crime.

This principle was recently discussed by Judge Friendly in *United States v. Miley*, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975), where he wrote that a participant in the crime is "no informant in the usual sense. . . ." 513 F.2d at 1204. In explaining the rationale of the rule, Judge Friendly observed that:

"To require a showing of previous reliability by such a person would, as in the case of a victim or a witness . . . make his information totally unavailable, despite the peculiar likelihood of its accuracy." *Id.*

Shortly after the decision in *Miley*, Judge Friendly again dealt with this issue in *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975). There he pointed to the "growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim or witness to a crime." 517 F.2d at 380.

Other cases in this circuit have likewise refused to require prior reliability where a paid informant was not involved. *United States v. Rollins*, 522 F.2d 160, 164 (2d Cir.), *cert. denied*, 424 U.S. 918 (1976) (*Aguilar* and *Spinelli* inapplicable where information from identified bystander rather than a paid informant); *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972). Compare *United States v. Karanthanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3762 (July 6, 1976), with *United States v. Rodriguez*, 532 F.2d 834, 837 (2d Cir. 1976).

The decisions of other circuits have similarly limited the requirement of known reliability to cases involving paid informants. *United States v. Darensbourg*, 520 F.2d 985, 988-89 (5th Cir. 1975); *United States v. Barfield*,

507 F.2d 53, 58 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975); *Cundiff v. United States*, 501 F.2d 188, 189-90 (8th Cir. 1974); *Agnellino v. New Jersey*, 493 F.2d 714, 726-27 (3d Cir. 1974); *Armour v. Salisbury*, 492 F.2d 1032 1035-36 (6th Cir. 1974); *United States ex rel. Saiken v. Bensinger*, 489 F.2d 865, 867 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); *United States v. McCoy*, 478 F.2d 176, 179 (10th Cir.), *cert. denied*, 414 U.S. 828 (1973); *United States v. Rajewich*, 470 F.2d 666, 668 (8th Cir. 1972); *United States v. Unger*, 469 F.2d 1283, 1287 n.4 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States v. Bell*, 457 F.2d 1231, 1238-39 (5th Cir. 1972); *United States v. Mahler*, 442 F.2d 1172, 1174-75 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); *Louie v. United States*, 426 F.2d 1398, 1401 (9th Cir.), *cert. denied*, 400 U.S. 918 (1970); *McCreary v. Sigler*, 406 F.2d 1264, 1269 (8th Cir.), *cert. denied*, 395 U.S. 981 (1969).

Judge Duffy's opinion requiring prior reliability for Rodriguez simply cannot be reconciled with these cases. Rodriguez was a participant in the crime, as well as an eyewitness to it. After her arrest for possession of a suitcase containing three kilograms of cocaine, she told the agents that she had received the suitcase from Sanchez-Rueda. She further related that Sanchez-Rueda had given her the bogus passport with which she was travelling and had arranged to meet her at the McAlpin Hotel in New York to take delivery of the suitcase there. Rodriguez made these statements as a co-conspirator and as a person with personal knowledge of the events which established Sanchez-Rueda's complicity and guilt. To create a requirement of prior reliability for Rodriguez was, as Judge Friendly observed, in *United States v. Miley*, *supra*, to make the information which she could furnish unavailable in a situation where she was uniquely able to supply the identities of the co-conspirators in this scheme for the importation of narcotics. By incorrectly inserting a re-

quirement of prior reliability in this case, the District Court did not apply the applicable law of this Circuit and, accordingly, failed to accord due weight to the information supplied by Rodriguez and the agents' right to rely on it.

B. The Requirement of Corroboration

Judge Duffy went on to determine that the information furnished by Rodriguez was uncorroborated. The underpinning of this conclusion was elucidated in the court's discussion of the tape recordings of Rodriguez' conversation with Sanchez-Rueda at the McAlpin Hotel. In assessing the corroborative value of that evidence, Judge Duffy stated that "there is nothing on the tape of that transmission which indicates that Rueda had any knowledge of the woman's involvement with illicit drugs." (Tr. 361).

Here, too, the District Court failed to apply the correct legal standard. In evaluating probable cause, evidence sufficient to corroborate even a previously unknown informant may be found in circumstances which do not actually establish the crime itself. This Court so held in *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972), stating as follows:

"An untested informant's story may be corroborated by other facts that become known to the affiant, even if they corroborate only innocent aspects of the story."

That precise language was recently quoted with approval in *United States v. Rollins*, 522 F.2d 160, 164-65 (2d Cir.), cert. denied, 424 U.S. 918 (1976). See also *United States v. Dzialak*, 441 F.2d 212, 216 (2d Cir.), cert. denied, 404 U.S. 883 (1971); *United States v. Viggiano*, 433 F.2d 716, 718-19 (2d Cir. 1970).

By searching only for direct evidence of Sanchez-Rueda's complicity in the narcotic venture, the District Court overlooked the numerous circumstances, perhaps innocent when taken one by one, which corroborated Rodriguez' story. First and foremost, Rodriguez' explanation of the scheme was corroborated when Sanchez-Rueda met her at the McAlpin Hotel in accordance with the game plan that she had outlined to the agents. Furthermore, the man whom the agents observed meeting with Rodriguez fit the description of Sanchez-Rueda previously furnished by Rodriguez. Indeed, even before the actual meeting occurred, Rodriguez' story of her arrangements to meet the defendant was confirmed by her telephone call to her mother in Colombia who had said that Sanchez-Rueda had been calling in an effort to ascertain her whereabouts.

Further corroboration was offered by the Kel transmissions which Agent Amador monitored as Rodriguez and Sanchez-Rueda met.* Rodriguez had previously told the agents that she and Sanchez-Rueda were lovers, a fact which was verified during their conversation in Spanish as she addressed him in endearing terms. (Tr. 91, 99). Most important, the nature of their discussion substantiated her essential story of Sanchez-Rueda's complicity in the scheme. He expressed in agitated and angry terms the concern which he had over the delay in her arrival, a

* Although Judge Duffy discounted the Kel transmissions in part because he found that the agents did not monitor all of the transmission, we rely only on those parts of the transmission that Agent Amador testified that he recalled hearing. Thus, although the tape recording of the transmission includes references to the "old man," to "drug trafficking" and to "whether in Puerto Rico everything come out alright," because Agent Amador did not testify specifically to hearing those parts of the conversation, we do not argue that they constitute a factor in determining probable cause. (GX 22-A; App. A-61, A-62).

fact which made perfect sense in the context of a large cocaine delivery where he was waiting anxiously to receive the goods. His suspicion that Rodriguez was lying to him about the reason for the delay was again consistent with the posture of a man cross-examining his co-conspirator, albeit his lover as well, on a failure to stick to the plan of action. Finally, the conversation also confirmed that Rodriguez and Sanchez-Rueda had travelled separately by a circuitous route in order to meet in New York, a fact inexplicable except in the context of a drug transaction where Rodriguez was serving as a courier.

Armed with the story that Rodriguez had told them, which was corroborated by all of these circumstantial facts, the agents obviously had sufficient probable cause to arrest. Indeed, on these facts, the agents would have had to believe the improbable in order to conclude that Sanchez-Rueda was merely an innocent party: they would have had to believe that Rodriguez had been carrying the suitcase full of cocaine for delivery to some other person but had deliberately framed her lover who happened to be anxiously awaiting her arrival at her destination in New York. The agents were obviously not required to draw such illogical inferences from the facts before them which clearly pointed to Sanchez-Rueda's guilt.

C. The Existence of Probable Cause and the Lawfulness of the Seizure

The often-recited standard applicable here is that "probable cause to arrest exists when an officer has knowledge of facts and circumstances sufficient to warrant a prudent man in believing 'that an offense is being or has been committed.'" *United States v. Edmonds*, 535 F.2d 714, 719 (2d Cir. 1976), *quoting from Beck v. Ohio*, 379 U.S. 89, 91 (1964). Although courts appear to find

that in making this determination the facts of prior cases do not offer much help beyond the general principles which they offer, see *United States v. Karanthanos*, *supra* at 36, the facts of *United States v. Miley*, *supra*, provide a measuring rod for this case and demonstrate that a finding of probable cause here was clearly required by the law of this circuit.*

In *Miley*, a defendant was arrested after he sold 10,000 units of LSD to undercover narcotics agents, a fact equivalent to Rodriguez' arrest for possession of cocaine. The defendant agreed to cooperate and identified his supplier, giving his first name, address and description, again equivalent to the information furnished by Rodriguez. Corroboration was offered by the fact that the defendant had been observed leaving that address prior to the sale, and when the agents arrived at the apartment, the description of the supplier turned out to be accurate. Equivalent factors were equally present in this case, where Sanchez-Rueda showed up at the planned meeting place and when the description of him was found to fit. While in *Miley* there was testimony that when the agents appeared at his door the supplier slammed his apartment door on an agent's arm, here there is additional evidence far more compelling which corroborated Rodriguez' story: namely, the furtive travel arrangements in which he and Rodriguez engaged, which specifically was

* In *United States v. Klein*, 522 F.2d 296, 298-300 (1st Cir. 1975), the First Circuit found probable cause to arrest Klein existed because Klein was in the vicinity of a drug transaction and thereafter was identified by his accomplice as the "source." See also *United States v. Polus*, 516 F.2d 1290 (1st Cir.), *cert. denied*, 423 U.S. 895 (1975).

corroborated by Sanchez-Rueda's own statements in the transmitted and tape-recorded conversation.*

Of course, once it is determined that probable cause existed for Sanchez-Rueda's arrest, the seizure of the matchbook from his person must be upheld as pursuant to a lawful search incident to arrest. *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edmonds*, *supra*.

In conclusion, the agents had more than sufficient information at the time of Sanchez-Rueda's arrest amounting to probable cause that he had committed a crime, namely, conspiracy to import three kilograms of cocaine. The District Court's determination to the contrary re-

* Although the District Court found *Wong Sun v. United States*, 371 U.S. 471 (1963) to be controlling, it clearly does not apply. In *Wong Sun*, Hom Way was arrested for a narcotics offense and he identified Blackie Toy as his supplier. The only information he gave about Blackie Toy was that he ran a laundry on Leavenworth Street. The agents searched Leavenworth Street, which was thirty blocks long, and found a laundry bearing the name "Oye," not "Toy." The Supreme Court held that the agents lacked probable cause to arrest the man who opened the door and was identified not as Blackie Toy, but as James Wah Toy, finding that not only was Hom Way an untested source, but the information which he had provided was too vague.

Wong Sun is readily distinguishable, since here Rodriguez gave specific information as to Sanchez-Rueda's identity and appearance; she provided the precise location where he would be found; she met with him evidencing for the agents that they were arresting the precise individual whom she had implicated. In sum, there was no danger, as in *Wong Sun*, that a totally innocent man would be arrested in his home in the middle of the night merely because his name and address were similar to that of a person accused of a crime. Furthermore, Sanchez-Rueda's appearance at the McAlpin confirmed the participation of which Rodriguez had accused him. By contrast, Toy had done nothing to evidence his participation or guilt prior to his arrest.

sulted from its erroneous application of law to the facts of this case. When the agents are granted the right to rely on Rodriguez' statements and when the circumstantially corroborating facts are considered, a finding of probable cause inexorably follows.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

AUDREY STRAUSS,
*Assistant United States Attorney,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AUDREY STRAUSS, being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 18th day of November, 1976,
She served a copy of the within brief by placing the same
a properly postpaid franked envelope addressed:

Ivan S. Fisher, Esq.
410 Park Avenue
New York, N. Y. 10022

And deponent further says that She sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Audrey Strauss

Sworn to before me this

18th day of November, 1976

Mary L. Avent
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No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
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